No. 12,440

United States
COURT OF APPEALS
for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
Appellant,

v.

FRED GESCHWILL,
Appellee.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

Appeal from the United States District Court for the District of Oregon.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
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STEVENS-NESS LAW PUB. CO., PORTLAND 2-51

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Appeal from the United States District Court for the District of Oregon.

TO THE HONORABLE, THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Comes now Hugo V. Loewi, Inc., a corporation, and respectfully petitions this honorable court for a rehearing in accordance with the rules and practice of this court, on the following grounds:

I. The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.

II. The court erred in refusing to apply the measure of damages specified in the contract.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I, Stuart W. Hill, one of the attorneys of record for the appellant on this appeal, hereby certify that in my opinion the petition for rehearing is well founded and that it is not interposed for delay.

STUART W. HILL,
One of the Attorneys for Appellant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

ARGUMENT

I.

ISSUE ON QUALITY

The court erred in deciding that the hops tendered by the appellee were of the quality called for by the contract.

The court concluded that the hops tendered did conform to the quality called for by the agreement, for these reasons:

1.

> "The proposition that 'prime quality' has no definite meaning has been advanced by the Oregon Court."

In support of that statement the court quoted at length from *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, in which it is stated that it is a matter of opinion whether a particular quantity of hops is or is not of prime quality, and that opinions differ. That is true, but in the present case the court completely disregarded two later Oregon cases which plainly establish that the term "prime quality" in this contract must be construed to mean exactly what the rest of the warranty specifies.

These two cases are cited and discussed on pages 23 and 24 of the appellant's brief.

The first is *Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636. In its opinion in that case the court said:

> "Therefore the contract under consideration defined the hops to be produced in terms which must be taken as the yardstick by which to measure their quality."

The second is *Wigan v. LaFollett,* 84 Or. 488, 165 Pac. 579, in which the following instruction was approved:

> "You are to accept the definition of prime quality as laid down in this contract by the parties themselves."

It is therefore established by the law of Oregon that the term "prime quality" must be interpreted to mean exactly what the other terms in the warranty specify.

In order to determine whether there is any evidence tending to establish that the hops tendered by the appellee met the quality provisions of the contract, it must be recalled that the appellee has taken the position from the commencement of this litigation that "prime quality" hops were those of average quality for the year in which grown. The evidence introduced by the appellee simply tended to support its contention that prime quality hops are average hops and that the appellee's hops were of average quality. On the other hand, the evidence introduced by the appellant tended to establish that the appellee's hops were not of prime quality as that term is defined in the contract.

Consequently, no square issue of fact was ever presented on the quality of these hops. The appellee's evi-

dence simply tended to establish that the hops were of average quality, whereas the appellant's evidence tended to establish that they were not of the quality specified in the contract.

Inasmuch as the law of this State, exemplified by the two cases last cited, declares that this contract must be construed in the manner advocated by the appellant, it follows that there is no evidence whatever in this case that the appellee's hops were of prime quality.

It must also be recalled that the court expressly refused to make a finding that the appellee's hops were of prime quality when tendered. The court did this by striking from the proposed findings of fact submitted by the appellee, a finding that the hops were of prime quality, and by inserting in its place a finding that the hops were "merchantable."

2.

> "We are of the opinion that the finding by the trial court that the mildew damage or blight was not material is supported by substantial evidence."

In answering this statement it is necessary to emphasize that the trial court refused to find that the hops tendered were of prime quality, that is, that they met the standards of quality specified in the contract, and found instead that the hops tendered were simply "merchantable."

It is well established, however, that hops or any other goods which are simply "merchantable" need not be accepted and paid for by the one to whom they are

tendered in performance of a contract calling for hops or goods of a particular quality, but may be rejected on the ground that they do not conform to the quality provisions of the contract.

Many cases establishing the proposition that unless goods are of the quality described in the contract, the buyer is not bound to accept them and can refuse to receive them, are cited in the appellant's brief, pages 41 to 45. Several of these cases establish that a buyer has a right to performance of the contract of sale in accordance with its terms and that it is no excuse to the seller that some other performance should be just as satisfactory or serviceable. In *Peck v. Hixon,* 47 Idaho 675, 277 Pac. 1112, discussed on pages 44 and 45 of the appellant's brief, the court made this statement:

> "It was not sufficient that those not of the quality stipulated were in fact merchantable. Respondents (buyers) were required to take only 'white-faced and Durham' steers."

If the condition of hops or other goods is such that they do not meet contract requirements but are simply merchantable, and they may accordingly be rejected by the buyer, it is very clear that the condition which prevents the hops or goods from meeting such contract requirements is decidedly material.

It follows that the finding that the mildew damage or blight was not material is inconsistent with the action of the court in finding that the hops were "merchantable" but not of "prime quality," and is contrary to law.

II.

LIQUIDATED DAMAGES

The court erred in refusing to apply the measure of damages specified in the contract.

The court recognized in its opinion that parties to a sales contract may specify that a certain measure of recovery shall be adopted in the event of a breach.

The court stated, however, that the measure of recovery which these parties adopted by their solemn acts cannot be applied for these reasons:

1.

> "There is nothing in the facts to indicate that it would be difficult to determine the damages of appellee by the normal rule of damages."

The court had stated previously the rule applied by it in these words, citing *Hull v. Angus,* 60 Or. 95, 118 Pac. 284:

> "Such agreements have been enforced where the parties have attempted to arrive at a reasonable measure of damages in a field where damages would be very uncertain and difficult to determine."

It is clear from a reading of the opinion in that case that the court did not state or apply a rule in the language of the Court of Appeals. In fact, the court sustained and applied the agreement for liquidated damages which had been made by the parties, on the ground that they could not foretell the damages when the con-

tract was made. Difficulty in proving damages at the trial had nothing to do with the decision.

Furthermore, the court was dealing with a liquidated damages clause pure and simple, which provided for a recovery wholly at variance with any established measure of damages. In this Geschwill case we are concerned only with a clause which adopts one of the statutory measures of recovery and precludes use of another.

If there is a rule of the sort stated by the Court of Appeals, it certainly has no application to this case. A rule of that kind could only have a basis for its existence when the parties were attempting to substitute for a tested and accepted measure of damages, one which might or might not be fair and reasonable. Here in this Geschwill case, the parties chose to follow one of the statutory methods of compensation and to exclude the other. These parties were not adopting a wholly untried method in place of one which has been tested for centuries.

Consequently, the rule stated by the Court of Appeals and its conclusion with respect thereto, are without materiality or significance.

The cases relied upon by the appellant in its original brief, pages 64 to 68, establish that the difficulty of ascertaining damages has nothing whatever to do with the sort of contract clause we are considering: one in which one statutory measure of damages is adopted and another excluded.

2.

> "The effect of the clause is to limit recovery to one particular method (based on market value) which, under the facts, would make it more difficult to determine damages."

Without citing any authority, the court gives this explanation for the statement just quoted:

> "We are aware of no reason why we should thus limit the method of recovery of damages where more definite and reasonable criteria are available."

We will consider first the word "definite" in that statement, and then the word "reasonable."

With respect to the word "definite," this portion of the court's opinion is, without justification, directly contrary to the actual decision of the court in two cases cited in the appellant's original brief, page 68.

It is there said:

> "If this contract provision is regarded as one authorizing the recovery of liquidated damages, it is unimportant that the measure of damages specified is as indefinite as the corresponding statutory measure of damages.
>
> "*Sheffield-King Milling Co. v. Domestic Science Baking Co.,* 95 Oh. St. 180, 115 N.E. 1014.
>
> "*International Milling Co. v. North Platte Flour Mills,* 119 Neb. 325, 229 N.W. 22."

In each of those cases based upon the Uniform Sales Act, the court sustained and applied complicated contract provisions to the exclusion of the simple statutory measure of damages. In each the contract called for

the purchase of wheat, milling it into flour, and sale of the flour. In each, furthermore, the contract specified that the damages should be computed in a particular manner based upon the price of wheat rather than of flour, and in each the necessary computation was much more complicated than if the statutory method had been used. In the *International Milling Co.* case, the court said that the contract measure of recovery was just as indefinite as the statutory measure of damages and was far more complicated.

Furthermore, the court is not justified in refusing to adopt a contract measure of recovery which is definite enough to have been used by the courts for centuries, simply on the ground that some other measure of damages excluded by the contract of the parties, may, in this case, appear easier of application by the court or the appellee's attorneys.

Turning now to the word "reasonable" in the quoted language, the same comment may be made. The court cannot justifiably refuse to adopt a contract measure of recovery which is reasonable enough to have been used by the courts for centuries, simply on the ground that some other measure of damages excluded by the contract of the parties, may, in this case, appear more reasonable.

The propositions stated in the two preceding paragraphs are supported by the two milling company cases and by the fundamental rule of the law of contracts that it is the function of the courts to interpret and enforce contracts as written and not to make new contracts for the parties.

A court is not authorized to make contracts for parties, or to alter or amend those which the parties have made.

Section 2-216, O.C.L.A., provides the general rule for the construction of instruments by the courts:

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all."

In *Scheuerman v. Mathison,* 74 Or. 40, 144 Pac. 1177, the rule is stated in these words:

> "Neither courts of law nor of equity have the right or power to make contracts for parties, or to alter or amend those that the parties have made. It is the intention of the parties, manifested by their words, and not the whim of the court, that must guide in construing contracts made by the parties thereto. In some instances, parties without exercising due caution, sign contracts that are not in all respects reasonable or fair; but when they execute such contracts, they are, in the absence of fraud, bound by them."

Salem King's Products Co. v. Ramp, 100 Or. 329, 196 Pac. 401.

Blessing v. Ocean Accident and Guarantee Corporation, 152 Or. 632, 54 Pac. 2d 300.

3.

"It would be unconscionable to restrict appellee to a measure of damages based on market value

where under the situation he faced due to this rejection he could not dispose of the hops without appellant's consent which came only after he had been compelled to bring suit."

The basis for this statement is that the contract was recorded as a chattel mortgage after rejection and that the appellant's consent was necessary to permit the sale of the hops to a third person.

The answer to the court's statement is readily made: The appellee did not ask for consent to sell to anyone else, until after suit was started. When he did ask, the consent was given at once. The appellant advanced a substantial sum to the appellee and naturally wanted the money repaid. Repayment would certainly be expedited more by giving the consent than withholding it and preventing a sale of the hops. No motive has been shown in the evidence for withholding the consent and the circumstances plainly declare that the consent would have been given at any time a request was made.

4.

"The measure of damages set out by the contract is not the exclusive remedy available to the seller."

This language was used by the parties:

" * * * the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is

hereby agreed and fixed and determined as liquidated damages."

This clause, considered alone, is subject to only one interpretation: the measure of damages therein set forth was to be applied to the exclusion of every other measure of recovery.

This is established by the following cases cited in the appellant's original brief, pages 64 to 68.

In *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, the contract clause provided:

> " * * * the seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the buyers, the difference between the contract price of said hops, as herein specified, and the market value of the kind and quality in this contract mentioned * * *."

The court held that the seller was limited to the measure of recovery so specified.

In *International Milling Co. v. North Platte Flour Mills,* supra, the opening clause of the damage provision was as follows:

> " * * * seller shall recover from buyer liquidated damages as follows: * * *."

Here again the court applied the contract measure of recovery.

In the light of these authorities, the contract clause in this Geschwill case, standing alone, clearly does provide that the measure of recovery stipulated therein shall be the exclusive remedy of the seller named therein, the appellee.

5.

> "In short, where, as here, there was no available market for the goods in question and such a market was obviously contemplated by the parties by the terms of the damage clause, the clause did not stand as a bar to the measure and theory of damages here adopted by the trial court which worked out substantial justice between the parties."

It will be assumed under this heading that the court meant that the contract damage provision cannot be regarded as furnishing the only measure of recovery in this case for the reason that the market value of the hops had to be taken into account in determining damages under that provision and "there was no available market for the goods in question."

There is no evidence whatever in this case from which any inference can be drawn, even the weakest, that "there was no available market for the goods in question." The only evidence in this case bearing on the state of the market, points to the opposite conclusion: The market remained firm for about a month after the appellant rejected the appellee's hops. The price then began to decline. It is undisputed that there was a good market for prime quality hops throughout 1947, and that the market price did not begin to fall until the latter part of November of that year. The court is referred to pages 36 and 37 of the appellant's brief for citations to the transcript.

For two months, therefore, after the rejection, there was a good market for the appellee's hops if they were of prime quality.

The trial court made this finding in paragraph 13 (Tr. 40):

> "There had been (presumably prior to the rejection of the appellee's hops on October 30, 1947) a material decline in the general market price and demand for 1947 Oregon cluster hops."

The appellant contended in its original brief, page 36, that there was no evidence to support that finding, using these words:

No evidence whatever was introduced in support of that finding. The market price of hops did not decline prior to the latter part of November, 1947. Mr. R. M. Walker, who was produced as a witness by the appellee, acknowledged that the market price of prime hops remained at 85¢ and 90¢ until the end of November, 1947 (Tr. 246). Mr. Ray and other witnesses testified that there was a scarcity of prime quality hops in 1947 and that there was a good market for them throughout 1947 (Tr. 362, 405, 470, 475, 476), and that the market price for hops of the type then available began to decline during the latter part of November (Tr. 246, 247; Exhibit 33, Tr. 285).

The only portions of the testimony to which the appellee directed the court's attention on this question (Brief xxii and xxiii) support the contentions of the appellant with respect to this finding. The evidence establishes that the inactivity of the market in December 1947 was due to the scarcity of prime quality hops offered for sale (Tr. 405; Wellman Tr. 225). There is nothing in this record beyond pure speculation, that the

inactivity in the market during December 1947 was due to any other cause.

CONCLUSION

The appellant respectfully contends that there is clear error in the decision of the court in the two respects discussed herein and requests a rehearing in order that this may be demonstrated beyond doubt.

Respectfully submitted,

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